

EXPRESS TRUSTS

Is it a trust?

Insert: A trust exists where the owner of property is obliged to deal with that property for the benefit of some other person or persons, or for some purpose recognized by law. In this case _____ is the owner (trustee) obliged to deal with the property _____ (subject) for the benefit of _____ (beneficiary).

But is this is a trust relationship? ----- not bailment because legal title was passed not just possessory, not agent because b/c legal title was passed, not debtor/ creditor because (trustee) does not have a duty to repay that is unrelated to particular property, not contract because no consideration was given by (trustee)----- therefore yes it remains a trust relationship

Is it an express trust?

Insert: For an express trust to exist the three certainties established in *Knight v Knight* must be satisfied and there must be complete constitution of the trust.

Is there a certainty of intention to create a trust?

Insert: The person establishing a trust, must have intended to create a trust, rather than any other legal relationship. The property (_____) is assigned by the settlor (name) to the trustee (name) for the benefit of (name) who is therefore the beneficiary. In order to establish if there was an intention to create an express trust, we must apply the objective test set out in (**Byrnes v Kendle**): would a reasonable person consider that there was intention for (x) to create an express trust? The test is one of 'substance over form'; *Kauter v Hilton*. When examining the facts of the case, it could be argued that a reasonable person would/would not agree there was intention due to -----argument here----- (see below to prompt)-----

1. Burden of Proof

The burden of proving the intention of the settlor lies with the person who alleges that a trust was intended; *Herdegen v Federal Commissioner of Taxation*

2. Beneficiaries Need Not Know of Trust

The beneficiaries need not know of the trust for it to be valid; *Moriarty v Various Customers of BA Peters Plc*

3. Words

No formal or technical words are required provided that a sufficiently clear intention to create a trust is shown.

- The question is one of substance and will turn on the facts of each case (*Kauter v Hilton*: passbooks held on trust for niece – the fact that the man gave the passbooks to the niece was indicative of the trust. He could not then operate the accounts without her consent and

participation)

However:

- It must be clear on a true construction of the words used by the settlor, **when viewed in their context and given their ordinary meaning**, that he or she intended to create a relationship having the necessary elements of trust
- A court will not impute to the settlor or testator an intention they did not have.
✚ Ford and Lee *Principles of Trust* (2010):

BUT if a person has shown an intention that another person should be entitled to benefit out of a specific property and a trust is, in the circumstances, the *appropriate legal mechanism for giving effect to that intention* an inference may be made that a trust was intended.

a. **Precatory words**

Trust must be an enforceable/imperative obligation. **Precatory words** will face difficulties with being enforced. Eg wish, desire, hope, request, confidence, trust eg trusting her, 'mere moral obligation' *Dean v Coles*. 'on the understanding that' did create trust bc of context of case *Hayes v National Heart Foundation*

4. Inferring an intention

Court may infer an intention where clear intention is not present.

'Trusts can be imposed by any language that is clear enough to show intention to impose'; *Williams*

'If a person has shown an intention that another should be entitled to benefit out of specific property and a trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention, and inference will be made that the person intended to create a trust'; *Re Armstrong*

Use *Byrnes v Kendle* – (objective intention) consider the nature of the transaction, the terms of the disposition and **all the circumstances**.

The test is one of '**substance over form**'; *Kauter v Hilton*

Beware Parol Evidence Rule – if agreement is wholly in writing, no extrinsic materials may be used for interpretation.

5. Quistclose Trusts (Mutual Intention)

Where one party advances money to another with the mutual intention that it should not become part of the assets of the borrower but should be **used for some specific purpose**, then a trust of the moneys will be implied if the **purpose fails**, *Barclays Bank v Quistclose*

Note: The onus of proof in these cases lies in the person asserting that such a trust was created *Peter Cox Investments v International Air Transport Assn*

Mere payment into a specially named account will not be enough, by itself, to show the necessary intention to create a trust *Re Fada (Australia) Ltd [1927] SASR 590.*

6. Can Intention be Rebutted?

Using the word 'trust' may not be sufficient to create a trust if a trust was in fact not intended.

Joliffe

FACTS: Husband opened bank account for wife, allegedly on trust. Husband denied this was his intention.

HELD: High Court held words of declaration could not create a trust contrary to true intention of creator.

Creator's subsequent conduct cannot contradict intention to create a trust:

Strang v Strang

FACTS: Lessee of a weekend lease had declared a trust of the leasehold in writing, in favour of his nephew. Lessee continued to live on the leasehold for decades and later rejected that he ever intended to create a trust.

HELD: The intention was clearly expressed in writing and regardless of the lessee's conduct thereafter, that evidence of intention could not be rebutted.

'The crucial question is whether there was the requisite intention at the time the declaration was made'.

Strong Evidence is Required:

'[I]t must be kept in mind that strong evidence of a contrary intention is required to rebut the unambiguous words of a declaration of trust...The question is one of fact in all cases'; *Strang v Strang*

Is there a certainty of the subject matter of the trust?

Insert: The second certainty established in *Knight v Knight* is in relation to the subject matter of the trust. It must be clear that a) there is property held on trust for a beneficiary; and b) that the property on trust is identifiable. As outlined in (*Palmer v Simmonds*) it must be certain and be specified with reasonable precision. In this case, the property held on trust is (INSERT) (see below for prompts)

What types of property can be trust property?

Real, personal, tangible, intangible, legal, equitable (eg beneficiary of a trust) limited interests (such as life interests) Chose in Action

Property must be specified with reasonable precision

Palmer v Simmonds 'the bulk of my estate' - failed

Re Kolb's Will Trusts 'blue chip securities' - succeeded

Re Golay's Will Trusts 'to let tossy.. enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties' – succeeded

Vagueness

'Vague dispositions that do not identify the property will fail; *Re Appleby's Estate*